(2)

No. 94-477

OCT 13 1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LEISURE TIME PRODUCTIONS, B.V.,
Petitioner,

vs.

TRI-STAR PICTURES, INC., COLUMBIA PICTURES INDUSTRIES, INC., COLUMBIA PICTURES ENTERTAINMENT, INC., HORIZON PICTURES, G.B., ACADEMY PICTURES, A.G. and DAVID N. BOTTOMS and HON. RAYA S. DREBEN, as Executors of the Estate of SAMUEL SPIEGEL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT TRI-STAR PICTURES, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Second Circuit correct in affirming the grant of summary judgment that Leisure Time Productions, B.V. had breached its agreement with Tri-Star Pictures, Inc., finding that there was no genuine issue of material fact that Leisure Time had failed, as required, to deliver the film "Return from the River Kwai" to Tri-Star for distribution, free of any claim which could interfere with Tri-Star's ability to distribute the film?

2. Was the Second Circuit correct in holding that Tri-Star had no duty or obligation to compel its affiliate, Columbia Pictures Industries, Inc., to grant a license for Leisure Time to use the title "Return From the River Kwai" where it found that the only evidence showed that Columbia Pictures owned the trademark rights in "Bridge On the River Kwai"; that there was no record basis to pierce the corporate veils of Tri-Star and Columbia Pictures; that Academy Pictures, A.G.'s royalty interest in "Bridge" permitted it to sue Tri-Star for any potential damage to its royalty interest; and that there was no evidence that Tri-Star had the right to dictate the licensing of any title owned by Columbia Pictures?

PARTIES TO THE PROCEEDINGS

Respondent Tri-Star Pictures, Inc. was the plaintiff in the district court and was an appellee in the Court of Appeals.* As only review of the grant of summary judgment to Tri-Star is sought by petitioner it is the only respondent who is opposing the Petition.

The other respondents who were third-party defendants in the district court and appellees below, are Columbia Pictures Industries, Inc. and Columbia Pictures Entertainment, Inc. The remaining respondents are Horizon Pictures, G.B., Academy Pictures, A.G. and David N. Bottoms and Hon. Raya S. Dreben, as Executors of the Estate of Samuel Spiegel.

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* Tri-Star Pictures, Inc.'s parent company is Sony Pictures Entertainment Inc. Sony Pictures Entertainment Inc.'s parent is Sony Corporation of Japan. Tri-Star Pictures, Inc. has no subsidiaries or affiliates that have issued shares to the public.

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No. 94-477

In The

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October Term, 1994

LEISURE TIME PRODUCTIONS, B.V.,

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-vs-

TRI-STAR PICTURES, INC., *et al.*

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Tri-Star Pictures, Inc. ("Tri-Star") respectfully submits that there are no "special and important reasons" (Sup. Ct. Rule 10.1) for this Court to exercise its discretion to grant the writ of certiorari sought by the Petition. The decision of the Court of Appeals for the Second Circuit does not conflict with the decision of any other court nor does it involve any question of federal law. Rather, this case merely

involves a garden variety contract dispute. Leisure Time Productions B.V. ("Leisure Time") attempts to mislead this Court, as it did below, that there are disputed facts; however, as the court of appeals found, there is no genuine issue as to any material fact relating to the contract dispute. The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

We refer to the thorough opinions below for a statement of the relevant facts. (Apps. B, C and E, A 6-9, 32-34 and 53-57). However, due to Leisure Time's misleading statements and its silence on the key contractual provisions at issue -- most notably the one it was found to have breached -- some further elaboration is required.

The undisputed material facts are simple: Tri-Star and Leisure Time entered into an agreement (the "Distribution Agreement" or the "Agreement") pursuant to which Tri-Star agreed to distribute a planned motion picture entitled "Return From The River Kwai" ("*Return*"). In the Agreement, Leisure Time represented and warranted to Tri-Star that *Return* would be provided for distribution free from *any "claims. . . which can* or will impair or interfere with the rights of Tri-Star hereunder." Academy Pictures, A.G. ("Academy") -- which has a right to receive royalties from the distribution of the classic motion picture "The Bridge On The River Kwai" ("*Bridge*") -- asserted (and continues to assert) that the title *Return* infringes on the trademark in *Bridge*. In a lawsuit still pending in the Southern District of New York, Academy is seeking an injunction against

the release and distribution of *Return*.[1] Plainly, Academy's infringement claim could impair Tri-Star's ability to distribute *Return*. Based on these undisputed facts, the court of appeals properly affirmed the grant of summary judgment to Tri-Star, holding that Leisure Time had breached the Agreement.

In a very real sense, this entire dispute is a self-inflicted wound by Leisure Time. The film *Return* is concededly a work of fiction, although it is based on a non-fiction book. The book was hardly a bestseller in the 1970's and there was no evidence of any following of the book in the late 1980's. All Leisure Time had to do to resolve Academy's claim -- and to have the film distributed -- was to remove the words "River Kwai" from the title. No other changes were necessary. The stubborn fact that Leisure Time did not do so does not merit extraordinary review by this Court.

Background of the Dispute

Columbia Pictures Industries, Inc. ("CPII") was the distributor of the film *Bridge*, which was released in 1957. The film had been produced by Samuel Spiegel through two corporations. A predecessor of Academy received the right from these corporations to certain royalty payments in connection with the distribution of *Bridge*. (A 53).

In 1959 CPII acquired the copyright to *Bridge* and all rights therein, *subject to* Academy's already existing royalty

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1 Although Leisure Time implies that Academy's claims against it have been resolved (Petition at 13, n.5), this second action is still pending (88 Civ. 9129).

interest. (*Id.*) Moreover, in a later agreement between CPII and Academy, entered into to resolve disputes pertaining to Academy's claims for royalty payments, Academy agreed not to sue CPII, its successors and affiliates for claims related to *Bridge except for* claims arising out of Academy's rights under the agreement, including Academy's right to receive royalty payments. Thus, despite Leisure Time's assertion that CPII had all rights in *Bridge* (Petition at 11), and as the court of appeals found, Academy retained its right to sue CPII to protect its royalty interest. (A 53).

In 1986, Tri-Star and Leisure Time entered into the Agreement pursuant to which Tri-Star was to distribute Leisure Time's planned motion picture *Return* in the United States and Canada. In the Agreement, Leisure Time expressly warranted and represented that:

> There are, and *will be*, *no claims*, liens, encumbrances or rights of any nature in or to the Picture or any part thereof *which can* or will *impair* or interfere with the rights of Tri-Star hereunder. . .[2]

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2 Incredibly, Leisure Time does not set forth this provision in its Petition, despite the fact that this provision is the one it was found to have breached. Leisure Time, instead, implies that Tri-Star's claim is based on some vague provision of the Agreement. (Petition at 7).

(A 60-61). Leisure Time also warranted and represented that *Return* "will not violate or infringe upon the trademark" of another party.

The Agreement further provided that an "Event of Default" included:

> Any breach or default by [Leisure Time] of any representation, warranty or other term or provision of this Agreement, which materially affects Tri-Star's rights hereunder.

Unbeknownst to Tri-Star at the time it entered into the Distribution Agreement in 1986, Leisure Time was on notice (since 1978) that CPII protested the use of the title *Return* because it was confusingly similar to the classic film *Bridge*.[3]

Although Leisure Time had registered the title *Return* with the MPAA in 1978, many registered titles are never used on motion pictures. Academy was unaware that Leisure Time intended to make a motion picture with the title *Return* until it was so notified by CPII in 1987. At that time, CPII informed Academy that it intended to make a claim against the use of the title *Return* on behalf of both CPII and Academy. CPII wrote to

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3 Under rules set by the Motion Picture Association of America ("MPAA"), after Leisure Time registered the title *Return* with the MPAA, CPII protested the title. The protest was deemed late and not considered by the MPAA, but Leisure Time was made aware of the protest. (A 54). The MPAA rules do not affect Academy's trademark claim.

Kurt Unger ("Unger"), the producer of *Return*, several times in 1987 to protest the use of the title *Return* because it infringed on CPII's *and* Academy's rights in *Bridge*. (A 56).

In December 1987, CPII and Tri-Star became sister corporations.[4] CPII notified Tri-Star in June 1988 of the dispute between Academy and Leisure Time over the title, informed Tri-Star that confusion over the title was already occurring and requested Tri-Star's aid in resolving the dispute.[5] (A 56). In September 1988, Tri-Star wrote to Unger requesting a change in the title in order to prevent a lawsuit by Academy and avoid the "substantial risk" that Academy would prevail in receiving an injunction. (A 56).

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4 The undisputed record below established that Tri-Star and CPII became sister corporations. Tri-Star -- the operating company -- became a subsidiary of Columbia Pictures Entertainment, Inc. ("CPE"), as did CPII. Tri-Star had and has no rights with respect to *Bridge* and did not gain control over CPII's film library. Tri-Star's and CPII's film libraries remained separate and Leisure Time offered no evidence to the contrary. (A53, n.1; A 66).

5 Leisure Time notes that the CPII executive who sent this letter had executed the Distribution Agreement for Tri-Star two years earlier and implies bad faith in the change in his position. (Petition at 10). But Leisure Time ignores three undisputed salient facts: 1) when Tri-Star entered into the Agreement it had no knowledge of CPII's claim, 2) CPII and Tri-Star were not sister corporations at the time of the Agreement and 3) in 1988 the executive was an employee of a different corporate entity.

After a period of negotiation -- during which Tri-Star attempted to mediate a settlement between Leisure Time and Academy -- Leisure Time proposed a change in the title to "March From The River Kwai" and the addition of a disclaimer. Despite Tri-Star's urging, Academy refused to accept this name change because the title still included the words "River Kwai". Academy informed CPII and Tri-Star that Academy would sue to restrain use of the words "River Kwai" and would name CPII and Tri-Star as defendants if they aided Leisure Time.[6] (A 56). Tri-Star informed Leisure Time of Academy's position and, in December 1988, sent Leisure Time a notice of default, giving it the required ten days to cure. Leisure Time continued to refuse to change the title of its film to remove the potentially infringing words, "River Kwai", and threatened to sue Tri-Star if it did not distribute *Return*. (A 56-57).

Proceedings Below

Tri-Star brought this action shortly thereafter for a declaratory judgment that Leisure Time had failed to deliver the film *Return* to Tri-Star free of any claims against it which could impair Tri-Star's right to distribute the film. At the same time, Tri-Star brought a companion suit in the Southern District of New York seeking to have the court determine the respective rights of Academy and Leisure Time in the titles *Bridge*, *Return* and "River Kwai." That case -- in which Academy has asserted

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6 It should be noted that Academy only protests the title, not the motion picture itself. Leisure Time has presented no evidence that it has incurred expenses in connection to the *title* of its film, only its production. (Petition at 20).

claims against Leisure Time and Tri-Star for trademark infringement and unfair competition -- is still pending.

On Tri-Star's motion for summary judgment in its declaratory judgment action relating to the contract, the district court held that Academy's claim was exactly the type of claim Tri-Star was protected from in the Agreement and, thus, that Leisure Time had breached the Agreement. (App. B, A 26). The court found that Academy's right to receive royalties from the distribution of the motion picture *Bridge* gave it standing to pursue trademark infringement claims under the Lanham Act against *Return* and that Academy's claim was not subject to dismissal on Leisure Time's summary judgment motion.[7] The district court specifically found that the litigation by Academy against Leisure Time seeking to enjoin the release and distribution of the movie *Return* "could clearly impair or interfere with Tri-Star's distribution rights."[8] (A 22).

The court of appeals affirmed the grant of summary judgment finding that Academy's claim of trademark infringement, and the injunctive relief it sought, constituted a claim which "materially affects Tri-Star's rights and obligations

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7 Both Academy's and Leisure Time's motions for summary judgment on Academy's trademark claims were denied by the district court, although the district court found that Academy had made a strong showing that it is entitled to relief under the Lanham Act. (App. C., A 44).

8 Subsequently the district court granted Tri-Star's, CPII's and CPE's motion to dismiss Leisure Time's tort claims against them and denied Leisure Time's cross-motion for reconsideration.

under the Distribution Agreement . . ." (App. E, A 65). Specifically, the court found that Academy had

> presented a colorable trademark claim, that may have forced Tri-Star to engage in protracted litigation. The Distribution Agreement clearly was designed to protect Tri-Star from such a burden. The claim was contrary to Leisure Time's representation that there would be no claims interfering with the rights of Tri-Star.

(A 62). Moreover, the court of appeals found that if Academy obtained a preliminary injunction enjoining the distribution of *Return*, Tri-Star's rights would be materially affected; indeed, Leisure Time conceded that effect in its answer.[9] (A 65).

Finally, the court of appeals found that Tri-Star had no duty or obligation to compel its sister company, CPII, to provide a license for Leisure Time because CPII, and not Tri-Star, owns the rights to *Bridge*. (A 66).

As we shall now further demonstrate, the Petition should be denied. This is an ordinary contract dispute, correctly decided

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9 The court of appeals further found that because Leisure Time's laches defense to Academy's claim could not be proved as a matter of law, Academy's claim still could materially affect Tri-Star's rights. (A 65).

below. There is no reason -- much less a "special" or "important" one -- for further review.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD FOR SUMMARY JUDGMENT

Leisure Time's arguments to this Court are without merit. The court of appeals affirmed the grant of summary judgment on Tri-Star's motion because it found no dispute as to whether a claim had been asserted which *could* materially affect Tri-Star's rights under the Agreement. The only dispute the court of appeals found, and on which Leisure Time relies heavily (*see, e.g.*, Petition at 18-19), centered on whether *Academy's* claim was barred by laches as a matter of law. The court of appeals found a factual dispute as to whether *Academy's* claim was barred by laches. Thus, it remained *undisputed* that Academy's claim continued to exist. And it is the existence of that claim -- a claim which *could* materially affect Tri-Star's rights under the Agreement -- which constituted a breach of that Agreement by Leisure Time.[10] (A 65).

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10 Thus, the Agreement protected Tri-Star from having to distribute the motion picture in the face of litigation involving a claim which could materially affect its rights. As the court of appeals found, it did not need to decide whether Academy's trademark action would succeed to decide this case. (A 61).

Hence, Leisure Time's petition involves no more than a garden variety breach of contract claim, where summary judgment is granted because one party has indisputably breached the contract and the contract's terms are clear. While Leisure Time asserts that the court of appeals decision "will chill, and may well paralyze, the motion picture industry" because distributors may walk away from contractual obligations "on the thinnest of claims" (Petition at 4-5), Leisure Time's real problem is that it is unhappy with the terms of the Agreement it made with Tri-Star and wants this Court to rewrite it to allow Tri-Star to terminate the Agreement only if a claim has been asserted *and* has succeeded. This Court should not grant a writ of certiorari to rewrite a contract. The language Lesiure Time relies upon is not the language of the Agreement -- as the court of appeals found, Tri-Star was protected from having to *litigate* any claim which could materially impair its rights, or to distribute the film if such a claim existed. (A 62). Moreover, contrary to Leisure Time's implication, Academy's claim is not "the thinnest of claims;" the district court found that Academy had made a strong showing that it is entitled to relief. (A 44).

As this Court has counseled, grants of summary judgment are "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). This Court has made clear that where there is no genuine issue as to any material fact and the moving party has established that it is entitled to dismissal of claims as a matter of law, then summary judgment must be granted. *Celotex*, 477 U.S. at 322; *Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020, 1030 (2d Cir. 1993); Fed. R. Civ. P. 56(c). The court of appeals scrupulously followed those mandates here.

As the court of appeals recognized in order to withstand a motion for summary judgment, the opponent must establish that there is a genuine issue of material fact as to the claim at issue. (*See* A 60); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). The mere existence of "*some* alleged factual dispute between the parties" will not suffice to defeat a properly pleaded motion for summary judgment, nor is it enough for the opponent to "simply show that there is some metaphysical doubt as to the material facts." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) (emphasis in original); *Matsushita*, 475 U.S. at 586. As the court of appeals found, none of Leisure Time's arguments in opposition were factually or legally supportable.

A. Academy's Claim Could Materially Affect Tri-Star's Rights

It is a breach of Leisure Time's warranty if Academy has a claim which *could* impair Tri-Star's rights. There is no doubt that Academy has such a claim. Academy's trademark infringement claim against *Return*, if successful, could result in an injunction against the release and distribution of Leisure Time's motion picture. Such a result would impair Tri-Star's right to distribute the film pursuant to the Agreement -- in fact, it would eliminate Tri-Star's ability to do so. As the court of appeals found, such an outcome would materially affect Tri-Star's rights under the Agreement.[11] (A 63). Faced with this obstacle,

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11 In its answer Leisure Time has admitted that Academy's claim, if successful, would damage Tri-Star. And as the court of appeals noted, Tri-Star's obligations included its contracting with exhibitors and others to market *Return*. An injunction against the motion

Footnote continued

Leisure Time argues that summary judgment was improper because Academy's claim could not materially affect Tri-Star's rights because the claim is unlikely to succeed as a result of Academy's laches. As previously noted, Leisure Time grossly distorts the Agreement's provisions in advancing this argument.

First, the Agreement's provisions could not be clearer. Leisure Time was obligated to deliver *Return* free of *any claims* which *could* impair Tri-Star's distribution rights. Thus, Tri-Star is protected from the assertion of any claim -- even if not ripened to judgment or not ultimately successful -- which could materially impair its rights.

Second, the evidence presented by Leisure Time does not establish, as a matter of undisputed fact and law, that Academy's claim for injunctive relief is barred by laches. Thus, it remains undisputed that Academy's claim continued to exist and constituted a claim under the Agreement.

In fact, Leisure Time concedes that there are disputed issues of material fact as to its defense of laches to Academy's claim. (Petition at 19). Leisure Time then goes on to argue that this dispute as to the validity of Academy's claim means that Tri-Star could not prevail on summary judgment. However, the court of appeals found that regardless of the ultimate success of

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Footnote continued from previous page

picture's release would adversely affect Tri-Star's relationship with those parties with which it necessarily would contract for the distribution and marketing of *Return*. (A 63-64).

Academy's claim, its continued existence and assertion constituted a claim under the Distribution Agreement. (A 65). Thus, since there is no dispute that: (1) Academy asserted a claim; (2) Academy's claim continued to exist; and (3) Academy's claim could materially affect Tri-Star's rights under the Distribution Agreement, summary judgment was appropriately granted.

B. Academy's Claim Cannot Be Cured By Leisure Time's Compulsory Licensing Theory

Leisure Time argues that Academy could not have prevented distribution of *Return* if Leisure Time had been licensed to use the name and that Tri-Star was obligated to grant such a license to Leisure Time. (Petition at 21). This argument fails because Tri-Star had neither the ability nor the obligation to grant, or cause CPII to grant, such a license. Moreover, there is no authority for such compulsory licensing

As the court of appeals found, Leisure Time offered no evidence that Tri-Star has any rights to motion pictures owned by CPII and, thus, any ability to license use of potentially infringing titles. (A 66). The undisputed evidence presented by Tri-Star showed that CPII and Tri-Star maintain separate motion picture libraries and have no rights to use or license motion pictures controlled by the other. Thus, not only did Tri-Star have no ability to grant such a license, it had no control over CPII's use of its library.

Tri-Star, CPII and CPE each have separate corporate existences which cannot be ignored. *Mellon Bank, N.A. v. Metro, Communications, Inc.*, 945 F.2d 635, 643 (3d Cir. 1991) (presumption of separateness applies to related corporations, even where one is wholly owned subsidiary of another), *cert. denied*, 112 S. Ct. 1476 (1992); *Crown Central Petroleum Corp. v.*

Cosmopolitan Shipping Co., 602 F.2d 474, 476 (2d Cir. 1979) (court noted that there is a presumption of separateness between two corporations, even when they are related). The undisputed evidence showed that CPII and Tri-Star became sister corporations in December 1987 but were, and are, separate corporations. The court of appeals did not require Leisure Time to *prove* that they were not separate, as Leisure Time claims (Petition at 22), but merely to offer some concrete evidence on this issue to avoid summary judgment. (A 66). Leisure Time's unsupported speculation as to the relationship between Tri-Star and CPII is insufficient to raise a genuine issue of material fact under established standards for determining summary judgment motions. *See, e.g., Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) (a party cannot defeat summary judgment through facts that amount to no more than "mere speculation or conjecture") (quoting *Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986) (citing *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985)), *cert. denied, 480 U.S. 932 (1987)).*

Even though Leisure Time has not shown that there are any facts or law to support its argument that Tri-Star had the ability to license, or force CPII to license, *Return*, Leisure Time argues that Tri-Star was obligated to license, or force CPII to license, *Return* because of Tri-Star's duty to exercise its good faith in dealing with Leisure Time. (Petition at 21). This argument fails on a multitude of grounds.

First, pursuant to the 1959 agreement between Academy and CPII, Academy retained the right to sue CPII and its affiliates for claims related to its right to receive royalty payments. In fact, later agreements between Academy and CPII demonstrate that disputes over CPII's distribution of *Bridge* were the subject of negotiation between CPII and Academy and that CPII and Academy acted in the belief that CPII did not have an unrestricted

right to license *Bridge*. This interpretation -- by the parties to the contracts themselves -- should be given "great, if not controlling weight in the construction of the contract." *Viacom Int'l Inc. v. Lorimar Prods., Inc.*, 486 F. Supp. 95, 98 n.3 (S.D.N.Y. 1980).

Second, pursuant to the agreements between Academy and CPII, CPII also owes an implied obligation of good faith to Academy to protect Academy's royalty interest and not deprive Academy of the benefit of its agreement by licensing a film which could damage the revenue stream in *Bridge*.

Moreover, as the court of appeals noted, CPII's obligations to Academy mean that it cannot grant a license in derogation of Academy's rights. (A 66); *See Cortner v. Israel*, 732 F.2d 267, 272 (2d Cir. 1984) (court noted that copyright owner's use of work may create liability to party entitled to royalties for breach of implied obligation not to use work in way that deprives that party of its right to royalties); *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co.*, 330 N.Y.S.2d 329, 334, 281 N.E.2d 142, 145, (N.Y.) (owner of legal rights may breach contract with author by acting in ways that harm royalty interest), *cert. denied,* 409 U.S. 875 (1972). And Leisure Time's contention that it never argued that *Return* should supplant *Bridge* (Petition at 24-25, n.9) is frivolous. Whatever Leisure Time has argued, the issue is whether *Return* could adversely affect Academy's royalty interest in *Bridge*. Both *Cortner* and *Van Valkenburgh* indicate that the licensing of *Return* could have resulted in an action by Academy against CPII based on its royalty interest in *Bridge*.

Furthermore, Tri-Star's contractual duty of good faith and fair dealing does *not* require it to issue a license to Leisure Time. As noted above, Tri-Star does not own the trademark in *Bridge* and CPII, which does own it, owes no obligation of good faith to Leisure Time. Moreover, any obligation of good faith

owed by Tri-Star to Leisure Time does not, and could not, include attempts to force an affiliated, but separate and independent, corporation into licensing a film which might create liability for that affiliate. This conclusion is dictated by both law and logic.

Leisure Time's factual arguments concerning Tri-Star's good faith merit little response, but Tri-Star will set the record straight. First, the disclaimer Leisure Time offered to add to the motion picture was for a film which retained the words "River Kwai" and that proposal was specifically rejected by Academy, despite Tri-Star's attempts to persuade it otherwise. Tri-Star's efforts to mediate the dispute cannot be equated with a finding as to whether such disclaimer, as a matter of law, would have defeated Academy's claim. Disclaimers do not automatically eliminate a claim and there are many factors a court considers in determining their effectiveness as a remedy. *See, e.g., Home Box Office, Inc. v. Showtime/Movie Channel Inc.*, 832 F.2d 1311, 1315-16 (2d Cir. 1987); *Charles of the Ritz Group Ltd. v. Quality King Distribs., Inc.*, 832 F.2d 1317, 1324 (2d Cir. 1987).

Further, if anyone has breached the covenant of good faith, it is Leisure Time. It owed not only an express warranty to Tri-Star, but also an implied obligation of good faith. It was grossly in bad faith for Leisure Time to refuse to drop the words "River Kwai" from the title of the motion picture. There was no legitimate reason for Leisure Time's refusal.

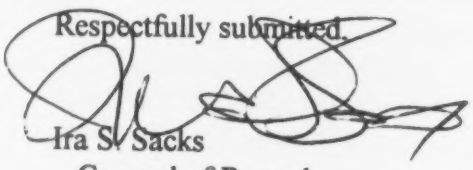
Finally, Leisure Time attempts to fan anti-Japanese prejudice by suggesting -- without a shred of record support -- that it is Sony that is at the root of this entire dispute because Sony wanted to avoid distribution of another Japanese war movie. That is a disgraceful tactic and, and as Leisure Time knows, contrary to fact.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

October 13, 1994

Respectfully submitted,



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